

BEST AVAILABLE COPY

LIST OF CORPORATIONS

The City of Charlotte, a municipal corporation located in Mecklenburg County, North Carolina, prior to the incident of which petitioner complains, had enacted resolutions pursuant to the laws of the State of North Carolina which provide for indemnification of all respondents for defense costs and payment of judgments and costs. The city has not invoked any reservations of rights.

There are no known insurance companies or other corporations with any interest in this litigation.

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CONSTITUTIONAL and STATUTORY PROVISIONS

U.S. Constitution Fourth Amendment	passim
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

DETHORN GRAHAM,

Petitioner,

v.

M.S. Conner, *et al.*,

Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For The Fourth Circuit

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

Respondents say certain assertions in Petitioner's Statement of the Case are not supported by the record.

On page 3 of Petitioner's brief it is asserted: "On November 12, 1984, while working on an automobile at home (J.A. 12), Graham felt the onset of a diabetic insulin reaction, a condition that occurs when the blood sugar level of a diabetic drops." (J.A. 31-32) Respondents find no competent evidence on J.A. 12 or any other page that plaintiff was suffering an "insulin reaction." Petitioner testified he

was "not familiar" with diabetic coma (T 19). Plaintiff's expert, Jessica Saxe, testified that plaintiff's combination of having eaten and having consumed alcohol would delay the onset of insulin reaction (T 47). Even if petitioner had a competent opinion about what his symptoms may mean, he never stated that opinion. He described how he felt but never said he was having an insulin reaction unless it was on cross examination (T 18, 25), although it probably is a fair conclusion. Jessica Saxe never testified to an opinion that petitioner had an insulin reaction. Objection to a question by counsel for plaintiff that assumed the fact of an insulin reaction was sustained. (J.A. 33) Therefore, respondents deny the existence of any competent evidence that plaintiff had an insulin reaction or whether his sugar was too low or too high. Jessica Saxe testified that consuming alcohol could raise blood sugar. (J.A. 34) Plaintiff's witness John Cherry testified as to some of the training given to Charlotte Police Officers, including the entirely different problems of low blood sugar and high blood sugar (T 60, Plaintiff's trial exhibit 3). Part of that training was that if high blood sugar "became severe enough, the individual becomes confused, disoriented, and stuporous, and eventually lapses into a coma." (Plaintiff's trial exhibit 3) The training also contained the instructions: "If the person indicates that he has eaten but has not taken his insulin, he may be progressing toward diabetic coma. But if he states that he has not eaten but has taken his insulin, insulin shock is indicated." (Plaintiff's Trial Exhibit 3) There is not enough evidence in the case at bar to prove what the respondents should have known or what remedy, if any, was preferred, and no evidence this condition or its treatment or lack of it caused any effect whatever on petitioner.

Petitioner's assertion on page 4 of his brief that "Without any inquiry, one of the officers (Rice) rolled Graham over and handcuffed him," is not a correct state-

ment of the record. Petitioner cites J.A. 41 but there witness Berry testified a white officer named Wright handcuffed petitioner. On pages J.A. 44 and 45, Berry testified that petitioner "refused to put on handcuffs" and "threw his hands up trying to keep them from putting the handcuffs on him," and that "Mr. Wright" then moved in and put on the handcuffs. Respondent R.B. Townes, a PO-2 with twelve years experience (T 63) testified as plaintiff's witness that he responded to an "Officer needs assistance" call (T 68), that he was the first back-up officer to arrive (T 64), and that when he arrived, petitioner was "trying to kick Officer Connor." (T 69) Plaintiff's expert in police training, Dr. Robert J. Meadows, testified (in the absence of the jury) that he had "no problem with him being subdued and handcuffed." (T 107)

Petitioner's assertion on page 5 of his brief that it was respondent Matos who refused to allow him to have orange juice is not a complete statement of the record. Although petitioner did say it was Matos (J.A. 18), he later made visual identification of Chandler as the officer who refused it (J.A. 29). Matos and Chandler are both blond females. Thus petitioner's testimony leads to speculation.

SUMMARY OF ARGUMENT

Respondents agree with petitioner that the claim is properly stated as an unreasonable seizure claim under the Fourth Amendment.

Respondents say that the record fails to show sufficient evidence of an unreasonable seizure or excessive use of force to survive a motion for directed verdict because there is no evidence of any significant degree of excessive force, the evidence requires speculation by the jury on material issues including the actions of individual respondents or persons who may not have been parties and including what injuries are claimed and from what causes.

The motion for directed verdict was properly allowed by the district court and affirmed by the Court of Appeals for the Fourth Circuit.

ARGUMENT

I. CLAIMS OF EXCESSIVE FORCE ARISING FROM AN INVESTIGATIVE STOP AND A SEIZURE ARE GOVERNED BY THE FOURTH AMENDMENT.

A. Petitioner was "Seized" under the Fourth Amendment When He Was Stopped for Questioning by Respondent Connor and Informed He Was Not Free to Leave Until Further Investigation Was Accomplished.

Respondents agree with petitioner that the evidence will support a finding that he was seized by respondent Connor in the course of an investigative detention. Respondents disagree with plaintiff's characterization of some of the evidence in the record, which will be discussed in a later section of this brief.

B. The Fourth Amendment Governs All Claims of Excessive Force Arising from Seizures of Citizens by Police Officers Acting Under Color of State Law.

Respondents agree with petitioner that "the potential constitutional right at issue must first be identified." (Petitioner's brief 14) Respondents also agree with petitioner's analysis which concludes that the Fourth Amendment "provides specific protection against unreasonable infliction of bodily harm to persons seized by state agents," (Petitioner's brief 22) and that "no need exists to go beyond that amendment to address his claim." (Petitioner's brief 23)

II. THE UNITED STATES COURT OF APPEALS DID NOT ERR BY REQUIRING PETITIONER TO PROVE THAT RESPONDENTS ACTED MALICIOUSLY AND SADISTICALLY IN ORDER TO STATE A FOURTH AMENDMENT CLAIM FOR UNREASONABLE SEIZURE PREDICATED UPON THE USE OF EXCESSIVE FORCE.

The United States Court of Appeals for the Fourth Circuit said, "[W]e reject any suggestion that the district court erred in setting forth the correct standard for constitutionally excessive force." (J.A. 59) The standard set forth by the district court did not refer to any amendment for support, except by citing *King v. Blankenship*, 636 F.2d 270 (4th Cir. 1980) and *Johnson v. Glick*, 481 F.2d at 1083. Nor did the district court list any "elements" of a constitutional violation which must be present, rather, it mentioned four "factors to be considered" which the court did consider. (J.A. 50) The Court of Appeals said that for plaintiff to suggest that the district court held the factors to be required elements was "a substantial misreading of our previous decisions," (J.A. 60) and the Court of Appeals further said that what it meant in *Kidd v. O'Neill*, 774 F.2d 1252 (4th Cir. 1985) was that these elements were "concepts" that "should be understood as descriptions of the degrees of force that exceed the state's privilege." (J.A. 60) They are "not the substantive tests of deprivation of constitutional right. . . ." *Kidd*, supra, at 1261, n. 15. Evidence of these factors would be evidence of excessive force.

The district court found "absolutely no evidence that the Defendant police inflicted any injury on the Plaintiff." (J.A. 51) In affirming the district court, the Court of Appeals found "no testimony from which a reasonable juror could infer that any officer struck Graham or in any way inflicted that injury [foot]." (J.A. 63) It found "no medical evidence to support his allegation of head injury." (J.A.

64) It found "no evidence that the officers denied appellant medical treatment." (J.A. 64)

The Court of Appeals referred to the difference between ascertaining whether there is evidence and weighing evidence. "We are convinced, however, that a reasonable jury *weighing the evidence* presented below in accordance with legal standards in this Circuit, *could not find* that the force was constitutionally excessive." (J.A. 65) (emphasis added) In *Kidd*, the same Court of Appeals discussed *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), which the Court of Appeals said "makes clear that the use of any significant degree of excessive force in effecting otherwise constitutionally valid arrests may constitute an unreasonable seizure of the person in violation of fourth amendment rights." *Kidd*, supra, 774 F.2d at 1256.

Since the Court of Appeals, having explained *Kidd* and *Garner*, said there was no evidence sufficient to go to the jury, it follows that it did not require plaintiff to prove that respondents acted maliciously and sadistically in order to state a Fourth Amendment claim for unreasonable seizure. It merely said that if petitioner should offer evidence of that, it would be enough to go to the jury.

Counsel's argument on the motion for directed verdict specifically referred at least twice to a "unreasonable force" standard to be applied to his clients. He argued to the trial judge: "All the other evidence is from Mr. Berry, and Mr. Berry said that he didn't see anybody hit him or strike him. They restrained him, and he helped do it. There is no evidence, I think, to go forward on the use of unreasonable force." (T 113) He also argued: "A lot of the things that the evidence is about are not identified as to which defendant may have done them. They just assume every defendant did them. There's still no evidence of unreasonable force." (T 114) This argument by respon-

dents to the district court is consistent with petitioner's Fourth Amendment argument here and further demonstrates that the "factors to be considered" were not held to be necessary elements of the offense, that the district court did not require petitioner to prove that respondents acted maliciously and sadistically and that the Court of Appeals did not hold that it did.

III. DIRECTED VERDICT WAS PROPERLY ALLOWED.

A. The Evidence About Respondent Connor:

Connor saw petitioner get out of the passenger's seat, run into a convenience store, run out again, get into the passenger seat, whereupon the car drove off apparently "in a hurry." (J.A. 13) He made the investigative stop. He informed the occupants they could not leave until he found out what had happened in the store. (J.A. 14) He was told petitioner "might be having a sugar reaction." (J.A. 14, 39) At some point he radioed "Officer needs assistance." (T 68)

Upon informing the occupants they had to wait, Connor was immediately faced with a violent reaction. Petitioner leaped from the passenger seat (J.A. 14, 40) and began running around. Berry testified that he asked Connor to help him contain petitioner (T 90) and he and Connor stopped petitioner by taking hold of him. (T 89) Berry weighs 280 pounds, "a lot bigger than Mr. Graham," and "got him sat down." (T 90) Berry testified that before any officer other than Connor arrived, petitioner was struggling with him and Connor and "throwing his arms around" (T 88) and that he, Berry, was trying to hold petitioner's arms. (T 88) Respondent Townes testified that he was the first back-up officer to arrive (T 64) and that he saw Berry and Connor "holding Mr. Graham." (T 64) He had heard the "Officer needs assistance" call, (T 68) and upon arrival he saw petitioner "trying to kick Officer

Connor." (T 69) Townes grabbed petitioner's feet and held them until Matos arrived when he asked her to take his position holding petitioner's feet while he conducted an investigation with nearby witnesses. (T 71)

Connor was not specifically named again until later in the events. Berry testified that Connor was one of the officers who put petitioner in the car (T 81), that while other officers put him in on one side, Connor "opened the other side of the door and pulled Mr. Graham through while the other three fed him in." (J.A. 42) Connor was the driver that took petitioner home, (J.A. 19) and helped give him orange juice. (J.A. 19)

B. The Evidence About Respondent Townes.

Petitioner did not mention Townes's name. He had an opportunity to point him out in court but did not. (J.A. 28, 29) (The record is not clear that Townes was present but petitioner did put Townes on the stand as his witness) (T 63)

Petitioner's witness Berry did not mention Townes's name or point him out.

Townes testified as petitioner's witness (T 63). He said he responded to an "Officer needs assistance" call and saw Connor and Berry struggling to hold petitioner and saw petitioner attempting to kick Connor. (T 68, 69) He said he held petitioner's feet until Matos arrived, then he asked Matos to hold petitioner's feet. (T 70, 71) There was no further evidence of any use of force by Townes.

C. The Evidence About Respondent Rice.

Townes testified that the next two officers to arrive after Matos were Chandler and Rice. (T 65) He made no other reference to Rice by name.

Petitioner testified that Rice walked him to the car (T 29) and had one arm when someone else pushed his head

onto the car. (J.A. 28) He testified that Rice was one of the officers sent to his home later after he had called the police department. (J.A. 21)

Petitioner's witness Berry never mentioned Rice by name and did not point him out in court. (J.A. 42) Petitioner's attorney inserted in his brief (pp 4, 39) that Rice rolled petitioner over "without the slightest inquiry" and handcuffed him, but there is no evidence of it. Arriving at this conclusion requires a finding that Berry's references to an officer Wright were actually references to Rice, but even that conclusion is not supported by the evidence because the evidence (see III-A above re Connor) shows that this officer arrived to see Berry and Connor struggling to hold petitioner's arms and Matos, a female, struggling to hold his feet.

D. The Evidence About Respondent Matos.

Matos is a blond female who looks a lot like respondent Chandler, also a blond female. (J.A. 18, at which page petitioner said Matos refused to let him have juice, and J.A. 29, at which page petitioner said it was Chandler "sitting on the far left" who refused to let him have the juice, and again at T-30 at which page he appeared once again to think it had been Matos, and finally at T-31 when he wasn't sure, but it was the one at the end of the row who was Chandler on J.A. 29)

Townes testified that Matos was the first officer after him to arrive and that he asked her to hold petitioner's feet. (T 65, 71) She arrived to see Berry and two uniformed officers struggling to hold petitioner down. (T 70) Townes saw Matos squat down and hold petitioner's feet, but nothing else. (T 71)

Petitioner, in addition to confusing Matos and Chandler (J.A. 18, 29, T 30, T 31) about who refused to let him have juice after he was in the car, testified that Matos was

present upon his arrival at home when he was given the juice and released. (J.A. 20) He testified she was one of the officers who was sent back to his home when he called the police department. (J.A. 21) Petitioner made no other references to Matos.

Berry testified that a female officer made a coarse statement about petitioner's condition (J.A. 42) but there was absolutely no evidence anyone paid any attention to the remark. It was regrettable but not unconstitutional. He testified that "a blond lady" pushed petitioner's head down but she was not identified. (J.A. 45) He detected no impact on the car. (J.A. 46)

The district court found that it had been Matos who pushed petitioner's head down (J.A. 49) but this finding was not supported by any evidence. No one ever pointed her out in court as the one and no one testified it was her. Indeed, when the trial judge was recapitulating the evidence (T 117, et seq) during argument on the motion for directed verdict, he said, "Officer Matos, I believe it is—am I pronouncing that correctly?—shoved his head onto the hood of the car. . . . Are we correct up to this point?" Counsel for respondents immediately stated, "I don't recall her name being used." The Court responded, "I think somebody identified Officer Matos. I'm not sure who it was." (T 120) Counsel cannot find any evidence in the record that it was Matos except for the fact that there are two blond females who are respondents, who look alike.

E. The Evidence About Respondent Chandler.

Chandler is the blond female officer who looks like respondent Matos.

Townes testified that Chandler arrived right after Matos arrived. (T 65) He testified that Chandler was the officer who pulled petitioner into the car from the opposite door. (T 73) He made no other reference to her.

Petitioner testified that Chandler refused him juice after he was in the car (J.A. 29) but he also twice said it had been Matos. (J.A. 18, T 30) He made no other reference to Chandler.

Berry testified that an officer, described only as "a lady," made a coarse remark (J.A. 42) but she was not even described as blond nor was there any evidence anyone paid any attention to it whatever. He testified that "a blond lady" pushed petitioner's head down (J.A. 45) but there was no other identification of the officer. He did not point out anyone who was in court.

F. The Evidence That a Respondent Struck Petitioner.

There was no evidence that anyone, let alone a respondent, struck petitioner.

G. The Evidence That a Respondent Caused Petitioner To Sustain a Head Injury or Ringing in his Ears.

The only evidence about what happened was that petitioner testified "somebody grabbed me from behind and slammed my head into the hood of Mr. Berry's car." (J.A. 17) The only evidence even remotely tending to show who that was was Berry's testimony that it was a blond female, and Berry heard "no impact." (J.A. 46) This limits the possibilities to Matos and Chandler, about whom it has been shown they look alike, and the additional possibility it was not a respondent at all. Other women were present although there was no evidence they were police officers. (T 70, 71, 72) Even identifying the individual requires letting the jury speculate. Petitioner concedes in his brief that he is not entitled to go forward when the evidence is not sufficient to reach a verdict without speculation. (Petitioner's brief 38)

The evidence of injury resulting from this incident consists only of petitioner's testimony that later, not right away, he developed ringing in his ears. (J.A. 23) This

evidence is all the evidence that any incident whatever caused ringing in his ears, and it is totally unsupported by medical opinion. The only medical opinion in the record is that petitioner's own doctor said the ringing could have come from his use of guns. (T 32, 33) Further, petitioner testified that he had a scraped place on his forehead "where the skin was gone," that "the concrete did that because it wasn't cut," and the evidence is that this injury would have occurred before petitioner was leaned against the car. This permits a finding that petitioner's pain was not a result of being pushed onto the car at all. There is no evidence by which to distinguish the results of two separate bumps to the head without more speculation, and no evidence that any respondent caused a concrete scrape. The evidence equally permits a finding that petitioner's own actions caused a concrete scrape, which means more speculation.

As to petitioner's use of the word "slammed," it is apparent from reading the entire record that he testified frequently in loose slang, such as being put into the car "like a bag of potatoes." (J.A. 17) It should take more than this to take a case to a jury against an unidentified respondent on speculative injuries.

H. Evidence That Petitioner was Injured While Being Put Into the Car.

There was no evidence that petitioner was injured while being put into car. He did not say so nor did any other witness. He did not say a door was slammed on him, that he bumped his head, or that he bumped anything at all. Two witnesses testified that he was resisting but was pulled in from across the car by one officer while being fed in by others. (J.A. 42, T 73)

I. Evidence About How Petitioner's Foot Was Broken.

There was evidence that petitioner's foot was discovered to be broken after he got home, but none what-

ever as to any cause and none that any respondent did anything that could have caused it. Petitioner did kick one shoe off while "fighting, kicking," (T 73) but whether he kicked anything was not known to Townes (T 73) Petitioner, who freely testified he could not remember everything, said he could not recall how his shoe came off or whether he kicked a car. (T 28) Pointing to a cause in this record requires more speculation.

J. The Evidence About Injury From Handcuffs.

There was no evidence who put handcuffs on petitioner and there was no evidence that petitioner ever complained that they were too tight. The only evidence connecting any respondent to putting on the handcuffs was that "Wright" put them on (J.A. 41) but that requires speculation if Wright is to be identified. Beyond that, there is no evidence any respondent knew how tight they were or that petitioner had any complaint about how tight they were. Further, there exists substantial evidence that their tightness could have been caused by plaintiff himself.

K. The Evidence About Injury Resulting From Petitioner's Having Diabetes.

There is no evidence that petitioner was in any manner injured as a result of having diabetes. Assuming he was having some reaction, the evidence is that he recovered consciousness before being put into the car, that he remained alert thereafter until he received orange juice at home, that he refused medical attention offered by respondents (T 72), and that he was normal thereafter. There was absolutely no evidence that his diabetic condition was altered or that any delay in getting orange juice caused any problem for him at any time.

Assuming again that he was having an insulin reaction, his own evidence was also that he had been drinking alcohol, although he denies it had any effect on his behav-

ior. (T 20, 85) Jessica Saxe said it would delay an insulin reaction under some circumstances. (T 46) No one testified petitioner's diabetic condition was changed by this incident.

SUMMARY

As counsel argued on motion for directed verdict, there was no evidence of the use of unreasonable force by any respondent. There was no evidence of any injury attributable to the use of unreasonable force. There was no evidence of "any significant degree of excessive force" by any respondent amounting to an unreasonable seizure. *Kidd, supra. Garner, supra.* The conclusions for which petitioner argues can only be reached by engaging in speculation. The motion for directed verdict was properly allowed.

CONCLUSION

The Court of Appeals for the Fourth Circuit was correct and should be affirmed.

Respectfully submitted,

FRANK B. AYCOCK, III
Attorney at Law
905 Cameron Brown Building
Charlotte, NC 28204
Telephone: (704) 375-3317

Counsel of Record
for Respondents